Supreme Court, U.S.
FILED
JAN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 89-908

In the Supreme Court of the United States

OCTOBER TERM, 1989

AUTOMOBILE CLUB OF MICHIGAN, a/k/a AAA, and
AUTO CLUB INSURANCE ASSOCIATION,
PETITIONERS

v.

WILLIAM J. BULLOCK,
RESPONDENT

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

REPLY BRIEF OF PETITIONERS

JOHN CORBETT O'MEARA
Counsel of Record
THEODORE R. OPPERWALL
Dickinson, Wright, Moon, Van Dusen & Freeman
800 First National Building
Detroit, Michigan 48226
(313) 223-3500

BOWNE OF DETROIT
610 WEST CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

TABLE OF CONTENTS

	Page
A. This Case Is Procedurally Appropriate For Review By This Court Now	2
B. Bullock's Argument Would Turn The *J.I. Case* and *Belknap* Decisions On Their Heads	4
C. Bullock's Implied Oral Contract Claims Are Not State-Mandated Minimum Labor Standards	6
D. The Issue Presented Broadly Affects Employers In Michigan And Elsewhere	7
E. The Conflict Between The Decision Below And Several Federal Courts Of Appeals Is Readily Apparent	8
F. Conclusion	9

TABLE OF AUTHORITIES

Cases:	Page
Allis-Chalmers Corp. v. *Lueck*, 471 U.S. 202 (1985)	3
American Ship Building Co v. *NLRB*, 380 U.S. 300 (1965)	6
Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983)	2, 5
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987)	8
Construction Laborers v. *Curry*, 371 U.S. 542 (1963)	3
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	2
Golden State Transit Corp. v. *Los Angeles*, 475 U.S. 608 (1986)	6
H.K. Porter Co. v. *NLRB*, 397 U.S. 99 (1970)	6
J.I. Case v. *NLRB*, 321 U.S. 332 (1944)	4
Motor Coach Employees v. *Lockridge*, 403 U.S. 274 (1971)	3
National Licorice v. *NLRB*, 309 U.S. 350 (1940)	4
National Metalcrafters, Division of Keystone Consolidated Industries v. *McNeil*, 784 F.2d 817 (7th Cir. 1986)	8
Powell v. *National Football League*, 888 F.2d 559 (8th Cir. 1989)	6

In the Supreme Court of the United States

OCTOBER TERM, 1989

NO. 89-908

AUTOMOBILE CLUB OF MICHIGAN, a/k/a AAA, and
AUTO CLUB INSURANCE ASSOCIATION,
PETITIONERS

v.

WILLIAM J. BULLOCK,
RESPONDENT

On Petition For A Writ Of Certiorari
To The Supreme Court Of Michigan

REPLY BRIEF OF PETITIONERS

Respondent Bullock's brief in opposition (at 11) acknowledges that he seeks to enforce state-law contract rights that *directly conflict* with AAA's federal-law right to unilaterally impose a last best offer following an impasse in bargaining. It is plainly Bullock, not his employer, who is "attempt[ing] to use individual contracts as a shield against collective negotiations" (brief at 7) — a use prohibited by this Court's decisions.

The points raised by Bullock in his brief in opposition confirm the necessity of this Court's review.

A. This Case Is Procedurally Appropriate For Review By This Court Now.

Bullock tries to obscure the importance of this case by suggesting that the record is inadequate and that other procedural idiosyncrasies of this case render the petition "untimely and improvident" (brief at 2 n.1). While this suggestion might well apply to the *state* contract law issues also addressed in the Michigan Supreme Court's opinion, it clearly does not apply to the *federal* labor law issues. *Only* with regard to the state-law contract issues did the Michigan court perceive inadequacies in the record requiring a remand *on those issues* (Pet. App. 11a-13a). Contrary to Bullock's assertion, the Michigan Supreme Court *unanimously* found the record adequate — *and factually undisputed* — for adjudicating the federal preemption issues.[1]

Nor is there any validity to Bullock's suggestion that some uniqueness of Michigan practice, combined with the amendment of Bullock's complaint, renders this case a procedural oddity or somehow makes it inappropriate for review by this Court (brief at 3-4, 12-13). There is no question that the Michigan Supreme Court's decision "finally" disposed of the NLRA preemption issue, which is central to all of Bullock's claims, and that to permit the litigation to go forward in state court without resolving the preemption issue "would involve a serious risk of eroding the federal statutory policy" of " 'requiring the subject matter of respondents' cause to be heard by the [National Labor Relations] Board, not by the state courts.' " *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-498 n.5 (1983), quoting *Cox Broadcasting Corp.* v.

---

[1] The only factual point concerning the federal preemption issue which Bullock contends is inadequately supported by the record is the timing of AAA's *initial* adoption of the "unit compensation" system in 1978 (brief at 2 & n.1). Even this is not so, however, because the facts in that regard are fully described in the Decision of the NLRB Administrative Law Judge, a copy of which has been lodged with the Clerk of the Court (Pet. 4-5 & n.2). It is also undisputed that the "unit compensation" system was part of the company's last best offer implemented following impasse in 1981 — the pertinent point for the NLRA preemption issue.

Cohn, 420 U.S. 469, 483 (1975); *Construction Laborers* v. *Curry*, 371 U.S. 542, 550 (1963).

Bullock's original one-count complaint (Pet. App. G) simply asserted a state-law contractual violation arising from AAA's unilateral implementation of "unit compensation" and minimum production standards.[2] AAA moved to dismiss Bullock's *entire original complaint* on the ground that it was preempted by the NLRA. While AAA's motion to dismiss was pending, Bullock filed a first amended complaint (Pet. App. H) which, for the first time, contained separate "counts" (Pet. App. 19a n.7). Bullock amended the complaint a second time, and it now has five separately labeled counts: breach of contract, promissory estoppel, unjust enrichment, conversion, and age discrimination (Pet. App. I).

As the Michigan courts recognized throughout the proceedings below, AAA's motion to dismiss on NLRA preemption grounds goes to the "central issue" underlying all of Bullock's claims: whether the unilateral implementation of terms of employment ("unit compensation" and minimum production standards) was federally protected and thus effective as to Bullock (Pet. App. 15a). A holding that the NLRA preempted state-law determination of this "central issue" would directly eliminate all of Bullock's counts or theories (however labeled) except age discrimination — and would even preempt that count to the extent it depended upon employment terms contrary to those implemented following impasse in bargaining.[3] As Bullock's brief

---

[2] That Bullock's original complaint (Pet. App. G) used the quasi-contractual expression "unjustly enriched" in paragraph 12 (Pet. App. 78a) does not generate a separate non-contractual count. Nor is "unjust enrichment" a non-contractual concept.

[3] This Court has frequently admonished that a plaintiff's choice of state-law labeling is not the relevant point for federal preemption analysis. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971). "Any other result would elevate form over substance" and permit parties to evade the requirements of federal law. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985).

acknowledges (at 13), all of his state-law claims, *including his age discrimination claim*, turn on whether AAA's implementation of minimum production standards violated a state-law right.[4]

A ruling by this Court finding NLRA preemption would not produce "an extremely truncated decision" (brief at 13), but instead would affirm, as to the central (and likely dispositive) issue in this entire litigation, AAA's right unilaterally to implement new and binding terms of employment following an impasse in collective bargaining. The hypothetical possibility that a remnant of a state-law age discrimination claim would remain for Bullock does not detract from the importance and propriety of addressing the NLRA preemption issue now.

B. Bullock's Argument Would Turn The *J.I. Case* and *Belknap* Decisions On Their Heads.

The Michigan Supreme Court (Pet. App. 27a-28a) and Bullock (brief at 7-8) have rested their view of NLRA preemption on *J.I. Case* v. *NLRB*, 321 U.S. 332 (1944), and *National Licorice* v. *NLRB*, 309 U.S. 350 (1940). But those early cases simply held that employers could not use individual contracts to defeat the collective bargaining process prescribed by the Act. In *J.I. Case*, the Court addressed in *dictum* the hypothetical enforceability by employees of individual contracts. See 321 U.S. at 336-337. But the Michigan Supreme Court's and Bullock's expansive interpretation and application of that *dictum* would negate the Court's holding that individual contracts may not be used to

---

[4] As Bullock notes (brief at 12 n.5), those lawsuits like his that have been tried in the Michigan courts have proceeded on *two* theories: breach of contract and age discrimination. The other three counts found in Bullock's second amended complaint (promissory estoppel, unjust enrichment, and conversion) have invariably been dismissed or withdrawn prior to trial or verdict. Thus, Bullock's emphasis (brief at 3, 13) on his conversion theory — based on an alleged "property right" in his "book" — is a red herring since no conversion claim has been, nor under Michigan law could be, recognized in this factual circumstance.

defeat the collective bargaining process.[5] In fact, Bullock is attempting to do here precisely what *J.I. Case* forbids: to use alleged individual contracts as a shield to defeat the collective bargaining process prescribed by the Act. The Act comprehends an employer's right to implement new and binding terms following an impasse in collective bargaining. As Bullock concedes, his claims would defeat that right and nullify one of the economic weapons left to bargaining parties under the Act. That is directly contrary to *J.I. Case's* holding and reasoning.

Nor does *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), support Bullock's argument. Pivotal to this Court's rejection of federal preemption in *Belknap* was the status of strike replacements as "innocent third parties" to the collective bargaining relationship who had no remedy under the NLRA. It was because the replacements were *outsiders to the federal scheme* that Justice White was mystified by the employer's suggestion that the NLRA shielded it from its state-law misrepresentation. *Id.* at 500.

Here, Bullock and his co-workers are not innocent third parties. *They invoked the federal scheme* by electing an exclusive bargaining representative and thereafter bargaining to impasse with their employer. Any complaints Bullock or his co-workers had regarding the collective bargaining process, or its product, could have been (and in some respects were) presented to the NLRB. To the extent there was merit to the charges (all charges were found to lack merit), the NLRB had statutory authority to fashion a remedy, including the re-establishment of the prior employment terms which Bullock and his co-workers now assert in their lawsuits (see Pet. 18-19).

While the impact of the state-law claims on the collective bargaining process was indirect and insignificant in *Belknap* because the plaintiffs were outside the federal scheme, it is most

---

[5] The *J.I. Case* Court also assumed in its *dictum* that, in a contractual hiatus, an employer "may be under no legal obligation to bargain collectively" (see Pet. 25 n.14). Later decisions of this Court and the NLRB have made clear that the duty to bargain continues unabated during a contractual hiatus.

direct and significant here. The scores of state court lawsuits filed by Bullock and his co-workers *directly attack their employer's ability to exercise a federally sanctioned economic self-help weapon*, by asserting that prior conflicting individual oral contract terms cannot be superseded by the post-impasse implementation of a last best offer. By substituting *state* court juries as the regulators of their employer's *federal* right, Bullock and his co-workers would radically alter the balance of economic self-help weapons, and thereby directly and significantly alter the collective bargaining process. In the Michigan Supreme Court's and Bullock's view, the only way an employer could effectively implement new terms, regardless of the exigencies of the situation or the unreasonableness of the union's demands, would be with the union's agreement. That is contrary to the fundamental federal policy of free collective bargaining under which both parties can resort to economic strength to support their bargaining positions. *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986); *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).[6]

C. Bullock's Implied Oral Contract Claims Are Not State-Mandated Minimum Labor Standards.

Bullock's brief (at 10-11) posits that Bullock's and his co-workers' implied oral contract claims are nothing more than state-mandated "minimum labor standards." To treat them otherwise, he contends, would make employees "hesitate to cast their lot with a union." Likewise, he continues, "there is no reason to give [AAA] the right to unilaterally impose its last offer" which would "violate[ ]" the employees' individual contracts and "deprive the unionized employees of their right to sue in state court."

---

[6] Relying on the reasoning of the Michigan Court of Appeals, Bullock's brief (at 9) asserts that an employer's right to implement a final offer following an impasse in bargaining "emanates from its common-law, entrepreneurial right to run its business." The Michigan Court of Appeals' characterization disregards the fact that, since the passage of the Act, this right has been part of the fabric of the federal labor laws and an essential component of the balance of economic weaponry reserved to labor disputants. See *American Ship Building Co* v. *NLRB*, 380 U.S. 300, 316 (1965); *Powell* v. *National Football League*, 888 F.2d 559, 566-568 (8th Cir. 1989).

These assertions are antithetical to fundamental precepts of federal labor law. Bullock's and his co-workers' implied oral contract claims are actually the *opposite* of state-mandated minimum labor standards because, as Bullock argues, they can *only* be modified by a consummated collective bargaining agreement. The key characteristic of a minimum labor standard is that it *cannot* be modified by a collective bargaining agreement. In addition, under Bullock's theory, each individual employee — not the state — creates the standard. Moreover, employees *should* "hesitate" before they cast their lot with a union because they do trade one set of legal rights for another once they fall under the federal labor relations scheme. And an employer manifestly *does* have the right under federal law to unilaterally impose its last best offer following an impasse (see Pet. 18-19) — action which has no purpose other than to supersede pre-existing rights of employees.

Bullock's argument presupposes that he and his co-workers may accept the benefits of unionization and collective bargaining, but assume none of the risks. Among those risks are the loss of pay due to a strike or lockout, or permanent replacement during a strike, or, as here, unilaterally altered terms following an impasse in collective bargaining. The logic of Bullock's argument would apply equally to all of these actions by an employer; they would all be in derogation of alleged individual oral contract rights. Under Bullock's view (brief at 11), *the employee* determines whether to "grant the employer the right" to exercise its federally sanctioned economic weapons. That view — which the court below adopted — is both nonsensical and corrosive of federal labor policy.

D. The Issue Presented Broadly Affects Employers In Michigan And Elsewhere.

Bullock's brief (at 13-15) asserts that the "narrow" issue in this case could arise only where an employer and union reach impasse while bargaining for a *first* contract. That is not so. The issue can arise whenever there is a hiatus in contractual coverage, which can occur in both new and mature bargaining relationships. It can also arise as employees move in and out of bargaining unit

positions. See *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 397-398 & n.12 (1987) (noting that individual contract claims by unionized employees "might be pre-empted by the NLRA").

Michigan alone has thousands of employers that face the prospect of state court lawsuits by unionized employees who, under the Michigan Supreme Court's holding, could make state-law claims during a hiatus in contractual coverage. Needless to say, the same sort of claim could be made in other states as well.[7] This Court should grant AAA's petition to prevent widespread erosion of federal labor law and policy.

E. The Conflict Between The Decision Below And Several Federal Courts Of Appeals Is Readily Apparent.

Bullock's brief (at 15-16) strains to suggest that the conflict identified in AAA's petition (at 26-29) does not exist. This is so, Bullock contends, because the hiatus in the instant case occurred before a *first* labor contract, while in the federal decisions the hiatus came before a second or later contract. That distinction — on which Bullock's entire argument rests — is a distinction without a difference. The same economic self-help weapon is involved regardless of when it is exercised. The *Garmon* and *Machinist* preemption principles are precisely the same.

The Seventh Circuit's decision in *National Metalcrafters, Division of Keystone Consolidated Industries* v. *McNeil*, 784 F.2d 817 (7th Cir. 1986), involves the same issue on virtually identical facts: after an impasse in bargaining, the employer unilaterally implemented a new vacation pay formula (here it was a unit compensation system and minimum production standards), and the employees sought to enforce pre-existing terms under state law. The Seventh Circuit found the state-law claim preempted by the NLRA. The Michigan Supreme Court, however, wrongly

---

[7] At least 35 other states have followed the lead of the Michigan Supreme Court in recognizing exceptions to the traditional employment-at-will doctrine (see Pet. 13 n.10).

dismissed the Seventh Circuit's decision as involving only §301 preemption (Pet. App. 21a-22a n.9). The conflict between the Michigan Supreme Court and several federal circuits is manifest, and deserves resolution by this Court.

F. Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN CORBETT O'MEARA
Counsel of Record
THEODORE R. OPPERWALL
Dickinson, Wright, Moon,
Van Dusen & Freeman
800 First National Building
Detroit, Michigan 48226
(313) 223-3500

January 1990